BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

Pursuant to order of the District Court, certain proceedings, including the Chancellor's oral decision, from the bench, had on March 1, 1938, were duly entered of record, on, to-wit, April 9, 1938. The following is part of such oral decision:

> "The Court: I have read the briefs in this case, gentlemen, and have examined the reports of findings of fact and conclusions of law which counsel have submitted. My mind is clear on some phases of the case; and on some other phases of the case it is not quite so clear.
>
> I am of the opinion that Messrs. Kremm and Schwerin practiced a fraud upon the Chain O'Mines Corporation and Stockholders. These two men were the two principal actors in that regard.
>
> Having observed them on the witness stand, I think probably Mr. Kremm did most of the leg-work, and that Mr. Schwerin did most of the thinking. I believe, however, they are equally guilty.
>
> The other defendants, including the corporate defendants, are merely the agents and instrumentalities of the principal defendants, Kremm and Schwerin. The other defendants are, I say, the instrumentalities and agents wherewith Kremm and Schwerin carried out their fraudulent design.
>
> The Chain O'Mines Corporation and its Stockholders were lulled into a sense of security by that contract of June 19. • • •

The fact that the contract was not signed by the holders of those judgments out in Colorado, does not, I think, prevent it from having the effect which I stated.

As a matter of fact, the holders of those judgments were brought into the scheme, not by their signatures to this particular contract, but by their signatures to other contracts, and the Chain O'Mines and the Stockholders should have had the benefit of those contracts.

Now, it is said the first corporation that was organized by Messrs. Kremm and Schwerin as an instrumentality for the perpetration of their fraudulent scheme, was not successful. I don't think that makes any difference. * * *

The mere fact that Kremm and Schwerin did not make as much money as they anticipated does not change the character of their acts; the mere fact that they had to do more work in and about their fraudulent scheme than anticipated; the mere fact that they had to organize a second corporation does not change the intent of their character or of their acts. The second corporation they caused to be organized has as much of the tint of fraudulent activity as did the first. * * *

There is one thing which I am not so clear about as yet, and in respect to that matter I desire further asistance of counsel. That matter is the form which the relief should take. * * *

Before I come to that, perhaps I should observe that apparently Mr. Schwerin relies upon the substantial inability of the plaintiffs to prove his knowledge of Mr. Kremm's holding the office of Director of the Chain O'Mines corporation at the time these fraudulent enterprises were entered upon. Now, I think that knowledge may be inferred from all the knowledge and

circumstances in the case, but I don't think it is necessary to do that. The evidence shows clearly that Mr. Seeley was Mr. Schwerin's agent, and Mr. Seeley attended a meeting of the Board of Directors of the Chain O'Mines Corporation at which Mr. Kremm was present and acting as a member of the board of directors. Mr. Seeley must have known and must have observed and must have known that Mr. Kremm was a director in Chain O'Mines Corporation. What he knew his principal Mr. Schwerin knew. However, I say I think the fact of the knowledge of Mr. Schwerin of Mr. Kremm's position may be inferred from all the facts and circumstances in the case." * * * (R. 1043-47.)

On April 9, 1938, the District Court made its findings of fact, stated its conclusions of law and entered its decree (R. 1054-90).

The opinion of the Circuit Court of Appeals (R. 1133) complained of, was filed January 26, 1940. A petition for rehearing, appropriately filed, was denied March 2, 1940 (R. 1189). Opinion is reported in 109 F. (2) 617.

STATEMENT OF THE CASE.

On November 23, 1937, petitioner, Chain O'Mines, Incorporated, a Nevada corporation, hereafter designated Chain O'Mines, together with fifty-five of its stockholders, filed its complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division, against the respondents, alleging, in substance, that Georges F. Kremm, Louis M. Seeley and Charles L. Schwerin conspired and agreed together to, and did, unlawfully secure title and possession of the mining properties belonging to plaintiff, Chain O'Mines, located in Gilpin County, Colo-

rado; the complaint alleged in detail the successive overt acts in the conspiracy; the prayer asked for specific performance of contract of June 19, 1934; that in default of such performance, said contract be declared a first lien mortgage, and a foreclosure thereof; for a money decree for damages, injunction, receiver and other relief (R. 2-21). Prayer was subsequently amended asking a re-conveyance to Chain O'Mines, of all of its properties so complained of (R. 69). On March 11, 1938, prayer was again amended, praying that all of the properties subject matter of contract of June 19, 1934, be impressed with a constructive trust, with other relief, in favor of Chain O'Mines (R. 73).

All of the respondents filed their respective answers to the complaint on January 15, 1938 (R. 25-66).

The District Judge heard all of the evidence introduced at the trial without reference to a master.

The evidence adduced by petitioners on the trial of the cause showed that the conspirators sought to cheat and defraud Chain O'Mines out of its properties by means of the contract of June 19, 1934, divers transfers of a labor lien, a power lien, sundry tax deeds and suits to quiet title; that Georges F. Kremm, Louis M. Seeley and Charles L. Schwerin were the conspirators; that Georges F. Kremm, director of Chain O'Mines, became the first participant.

Lien of Edward H. Lewison.

March 17, 1934, a mechanic's lien judgment was entered in the District Court of Gilpin County, Colorado, in an action entitled, "Edward H. Lewison, assignee of 126 other labor claimants, as Plaintiff, and Public Service Company of Colorado, Cross Complainant, *vs.* Chain O'Mines, Incorporated, *et al.*," known as Case No. 5064, in the amount of approximately $100,000.00. This judgment immediately be-

came a first lien on the property of Chain O'Mines, located in Gilpin County, Colorado, and will hereafter be referred to as the labor and power liens (R. 867-898).

May 8, 1934 (R. 84), Georges F. Kremm was re-elected a director of Chain O'Mines. Kremm had previously, for a period of about three months during the early part of 1933, been a director (R. 212).

May 21, 1934, Georges F. Kremm went to Central City, Colorado and visited with Leroy J. Williams about the labor lien, and thereupon Williams agreed to settle, and ultimately sell and convey, the lien of Edward H. Lewison, whom he, the said Williams represented, to said Kremm (Plaintiffs' Ex. 10; R. 109).

On June 19, 1934 there came into being a proposed plan by Georges F. Kremm, whereby it was believed the stockholders and creditors of Chain O'Mines would be protected and their investments preserved (Plaintiffs' Ex. 9; R. 108).

At the meeting of the board of directors on June 19, 1934 (Plaintiffs' Ex. 8; R. 100), Georges F. Kremm submitted his plan (Plaintiffs' Ex. 9; R. 108). This plan provided, among other things, that the title and possession to the property of Chain O'Mines, located in Gilpin County, Colorado, and all of its equipment, would be acquired by Louis M. Seeley, the designated agent and representative of Charles L. Schwerin and Georges F. Kremm; that a corporation would immediately be formed by the said Louis M. Seeley, to take over the property of Chain O'Mines, through the medium of the labor and power lien aforesaid; that such corporation to be formed, at an appropriate time after its incorporation, would execute and deliver to a trustee to be agreed upon, a mortgage in the principal amount of $2,000,000.00, or the sum of $1,500,000.00 in the event that certain conditions of the plan had not been carried

out by Chain O'Mines, which said mortgage was intended for the benefit of Chain O'Mines, its stockholders and creditors; the plan further provided that interest would be paid on this mortgage; that said corporation when organized and operating would pay a royalty on all ores mined, such interest and royalty to be deposited with the trustee to be named, all for the benefit of Chain O'Mines.

After this special meeting of the board of directors of June 19, 1934 was called to order, in accordance with the waiver of notice above referred to, a discussion was had among the directors concerning the proposed plan by Kremm. It was observed that the proposed agreement contained the name of Louis M. Seeley instead of Georges F. Kremm, and the directors inquired as to who Seeley was. Thereupon, Kremm called his associate, Louis M. Seeley, into the meeting room. He introduced Seeley to the board of directors as his associate and in presenting Seeley he said he wanted him to meet his (Kremm's) associate members of the board. Presently Seeley retired from the room and Kremm delivered the ultimatum that the agreement would have to be signed "tonight," or not at all. At this meeting the board of directors, with respect to the affairs of Chain O'Mines, was in a desperate situation, and, there appearing no alternative, a resolution prepared and presented by Kremm was passed by the board, unanimously, authorizing the proper officers of the company to sign the agreement; whereupon, Seeley was recalled to the room where the meeting was being held and the contract of June 19, 1934 was signed (R. 107).

This contract of June 19, 1934 was subsequently and in due time ratified and confirmed by the voting trustees, representing more than two-thirds of the common stock of Chain O'Mines (Plaintiffs' Ex. 15; R. 134).

The evidence further showed that Charles L. Schwerin, one of the conspirators herein, prior to the meeting of June 19, 1934, insisted that Louis M. Seeley be designated in said contract as the party to acquire the properties of Chain O'Mines (R. 998).

Charles L. Schwerin, as the evidence showed, was the president and director of a number of corporations, engaged principally in the management of improved real estate in Chicago, Illinois and Milwaukee, Wisconsin, and apparently had more than the ordinary amount of business experience (R. 996).

July 23, 1934, one month and four days following the execution of the contract, Central City Gold Mines Company was organized under the laws of the State of Colorado (Plaintiffs' Ex. 29; R. 226). Immediately prior thereto, William M. Muchow, formerly president and now manager of a defaulted lessee, in possession, delivered possession of all of the property of Chain O'Mines, to Georges F. Kremm at Central City, Colorado. This was done pursuant to the terms of the contract of June 19, 1934 (R. 270-71).

On April 23, 1935, the Lewison contract was cancelled for default in payment. The date is important, the evidence showing that on April 22, 1935, in pursuance of instructions given by Charles L. Schwerin, Charles R. Enos, attorney for all of the parties named as conspirators herein (R. 929), together with his law partners as incorporators, organized the United Gilpin Corporation under the laws of the State of Colorado (Plaintiffs' Ex. 67; R. 488), with a capital stock of $350,000.00, divided into 350,000 shares of common stock at a par value of $1.00 each, to be issued as fully paid and non-assessable.

The evidence showed that shortly after this incorporation, Georges F. Kremm was elected a member of the board of directors, and its officers consisted of Charles L. Schwer-

in as president, Pages J. Thibodeaux, Jr., an employe of Beedee Management Company, as vice-president, L. O. Byron, also an employe of Beedee Management Company, as secretary, and L. M. Seeley, likewise an employe of Beedee Management Company, as treasurer (Plaintiffs' Ex. 68; R. 504). Subsequently, Kremm, according to the evidence, was elected chairman of the board of directors (Plaintiffs' Ex. 74; R. 805).

April 30, 1935, eight days after the incorporation of the United Gilpin Corporation, a new agreement was entered into by and between Edward H. Lewison and Leroy J. Williams, his attorney, with one A. S. Hurter, a clerk of Schwerin and in the employ of Beedee Management Company, under the terms of which the said Hurter contracted to purchase the same interest in the labor lien that was originally contracted for purchase by Kremm on May 21, 1934; that Hurter made a down payment of $1,500.00, amount in default by Central City Gold Mines Co., which money was furnished by Beedee Management Company (R. 1006). This agreement gave power to Hurter to take possession and operate the Chain O'Mines properties as long as the terms of the agreement were complied with (Plaintiffs' Ex. 74; R. 655). This deal was affected through Enos and Williams, attorneys for the respective parties. Williams never met Hurter (R. 929).

The following day, Hurter assigned said contract to United Gilpin Corporation, (Plaintiffs' Ex. 74; R. 659):

Thereupon, 340,000 shares of the common capital stock of the United Gilpin Corporation were issued, and note for $49,000.00 executed, as the evidence shows, to Hurter for the benefit of Charles L. Schwerin, Georges F. Kremm and Louis M. Seeley, and distributed, by designation of Schwerin, to divers persons and corporations without consideration (Plaintiffs' Ex. 74; R. 719).

Lien of Public Service Company of Colorado.

July 26, 1934, Central City Gold Mines Company, four days after its incorporation, agreed to buy, and Public Service Company agreed to sell, 33751/97226ths undivided interest in the Sheriff's certificate of sale issued in pursuance of the Lewison judgment, for $33,000.00, payable in Cities Service Power & Light Company 5½% Debentures, at par. This agreement was signed by George F. Kremm, as president of Central City Gold Mines Company, and by Louis M. Seeley as the secretary thereof (Plaintiffs' Ex. 74; R. 663).

April 30, 1935, following the incorporation of the United Gilpin Corporation, Central City Gold Mines Company assigned all of its right, title and interest in and to the aforesaid agreement, in consideration of the sum of Five Dollars, to Beedee Management Company. This assignment was signed by George F. Kremm as president of Central City Gold Mines Company, and by Louis M. Seeley as secretary thereof (Plaintiffs' Ex. 74; R. 674).

May 3, 1935, Beedee Management Company, by Charles L. Schwerin, president, and L. O. Byron, secretary, transferred and sold to the United Gilpin Corporation, by assignment, all of its right, title and interest in and to the agreement with the Public Service Company of Colorado, dated July 26, 1934, for 9,993 shares of the capital stock of United Gilpin Corporation (Plaintiffs' Ex. 74; R. 681).

The statement made by the officers and directors of United Gilpin Corporation to Securities and Exchange Commission, appearing in Plaintiffs' Exhibit 74, is as follows:

> • • • "Prior thereto, Central City Gold Mines Company had lost all of its right in this contract with

Edward H. Lewison, *et al.* by default, and by declaration of default by Edward H. Lewison, and prior thereto, likewise, Central City Gold Mines Co. had also lost any rights in the Public Service Company of Colorado contract by assignment, for a consideration, to Beedee Management Company, and ceased doing business. Not only was no going business acquired, but no consideration of any sort was paid to any party for any going business." (Plaintiffs' Ex. 74; R. 710.)

Tax Titles.

To further perfect their titles and more surely eliminate Chain O'Mines, the respondents caused their attorney in Colorado, Charles R. Enos, to acquire tax titles to the properties. This, notwithstanding their contract to pay taxes. (Plaintiffs' Ex. 9; R. 113). The titles(?) thus acquired were by mesne conveyances conveyed to United Gilpin Corporation (Plaintiffs' Ex. 56; R. 422); (Plaintiffs' Ex. 57; R. 426); (Plaintiffs' Ex. 58; R. 432).

Suits to Quiet Title.

Actions to quiet these titles against claims of Chain O'Mines were commenced but not prosecuted to judgment before the commencement of this action (Plaintiffs' Ex. 61, 62, 63; R. 446, 454, 458, 465, 477) when further prosecution was enjoined by the District Court herein.

Specification of Errors.

1. The Circuit Court of Appeals erred in its review of the evidence herein and in reversing the findings of fact of the District Court, based on substantial evidence.

2. The Circuit Court of Appeals erred in interpreting the contract of June 19, 1934 (R. 110-115) to contain an

agreement by the defendant Seeley to "float" a $2,000,000.00 mortgage, to acquire the labor and power lien therein described, and thereafter to restore plaintiff's property to it (R. 1137).

3. The Circuit Court of Appeals erred in basing its opinion and judgment in large part on the alleged fact that the operations by the defendant, United Gilpin Corporation, of the mining property involved were unprofitable (R. 1142).

4. The Circuit Court of Appeals erred in deciding that the local law of the State of Illinois requires that for the imposition of a constructive trust in this case the evidence of actual fraud be such as to preclude any other theory or explanation (R. 1141).

5. The Circuit Court of Appeals erred in reversing the decree of the District Court and ordering that the suit be dismissed.

SUMMARY OF ARGUMENT.

A consideration of all of the evidence in this record leads to the inevitable conclusion that Georges F. Kremm, Charles L. Schwerin and Louis M. Seeley, directly and through instrumentalities of Central City Gold Mines Co., United Gilpin Corporation, Beedee Management Company, L. O. Byron and A. S. Hurter, entered into and consummated a conspiracy to cheat and defraud Chain O'Mines, Incorporated, of its mining properties located in Gilpin county, Colorada, through the medium of the contract of June 19, 1934 and other contracts incidental thereto entered into for the acquisition of a labor and power lien Sheriff's certificate of sale from Edward H. Lewison and Public Service Company of Colorado, and by means of tax title deeds and suits to quiet title, as more fully set forth in the oral decision, from the bench, of the trial judge, and in the findings of fact and the record in this proceeding; that as a result of such conspiracy, said co-conspirators and their instrumental corporations did acquire and appropriate to their own use and gain all of the mining properties of Chain O'Mines, Incorporated, without having paid or rendered to it any compensation whatsoever therefor. That under such circumstances, said properties became impressed with a constructive trust in favor of Chain O'Mines, Incorporated, and that said corporation was and is entitled to the return of its properties.

ARGUMENT.

Misconception of Decree.

In its opinion, p. 620, the Circuit Court of Appeals uses the following language:

> "The District Court was of the firm belief that the three men (and incidentally the other defendants) had devised a fraudulent scheme whereby they would gain possession of the plaintiff's mines, and that they in fact mined ore greatly in excess of the value of $700,000 ~~$700.00~~ for which they should account. *The trial court interpreted the defendants' failure to float the $2,000,000 mortgage provided for by the June 19, 1934 contract as indicative of their intent to cheat the plaintiff after lulling the plaintiff and its stockholders into the belief that the acquisition of the labor and power lien certificate with defendants' funds was a temporary phase in the refinancing project, and that all its property would be restored to it upon the floating of this mortgage, which never occurred.*" (Italics ours.)

This is an obvious misconception of the findings of fact, conclusions of law and decree of the trial court.

There is not a word, sentence or paragraph to be found in the contract of June 19, 1934, the terms of which are substantially embodied in the findings, or in the entire findings of fact, conclusions of law or decree of the District Court that by the widest stretch of the imagination might be construed or interpreted to mean that that court assumed, indicated or found that defendants were to "*float*" a mortgage, or that there was a "*temporary*

phase'' or a *''refinancing project''* involved in the transaction, or that plaintiff's *''property would be restored to it upon the floating of this mortgage.''* (Italics ours.)

Assumptions of non-existent facts or findings cannot, of course, be made the basis upon which to predicate fraud —or anything.

The sale by plaintiff of the equity of redemption of its properties, under the terms of the contract of June 19, 1934 was absolute and final and was so found by the trial judge. The consideration provided was the execution and delivery to a trustee, for the benefit of Chain O'Mines, of a mortgage which was to be in the amount of $2,000,000 if there should be included in the transaction another group of mining claims known as California Hidden Treasure Mine, otherwise in the sum of $1,500,000, with provision for interest, royalty on tonnage milled, payment of taxes, etc. Obviously, default in performance of the covenants of the mortgage, when executed and delivered, alone, and a foreclosure in the usual manner would be the only method by which Chain O'Mines might have had its properties restored to it.

It is respectfully urged that this Court examine the findings of fact, conclusions of law and decree of the District Court (R. 1054-90) and as well the agreement between the parties (Plff's. Ex. 9, R. 108-15).

Contract and Facts.

In this connection we here quote briefly pertinent parts of agreement of June 19, 1934:

> ''* * * 1. L. M. Seeley agrees to purchase from Edward H. Lewison and the Public Service Company of Colorado, a corporation, all their right, title and interest in the property aforesaid under the following contract of purchase: * * * (R. 110).

3. L. M. Seeley agrees to assign to a proper corporation to be formed, all his right, title and interest in and to the property aforesaid, said assignment to said proposed corporation to be subject to the following conditions and limitations:

(a) The proposed corporation will *execute* a mortgage in the sum of Two Million Dollars ($2,000,000.00) with interest at the rate of one per cent (1%) per annum for two years, and four per cent (4%) per annum thereafter, for the balance of a twenty-five (25) year term, to the same escrow agent referred to in paragraph '2' hereof. The first year's interest to be paid one (1) year from the date of the execution of said mortgage, and quarterly thereafter.

(b) The mortgagor agrees to deposit with the trustee agent in escrow, in payment of accumulating interest and for the retirement of the principal sum of the above mortgage, the sum of five cents (5¢) per ton for all ore milled on the property above described by the said L. M. Seeley or his assigns during the first two (2) year period, and twenty cents (20¢) per ton thereafter. The proceeds of these tonnage payments *are to be paid* by the escrowee *to the order of Chain O'Mines, Incorporated,* as it accumulates, in multiples of One thousand and no/100 dollars ($1,000.00), to be placed in a sinking fund for the ultimate retirement of the principal, to be paid by the escrowee to the trustee in retirement of the principal of said mortgage, after current interest and a sum equal to the succeeding year's current interest is accumulated.

(c) Whenever there is a ninety (90) day default in the payment of interest due under the mortgage, the escrowee shall be empowered to *deliver to Chain*

O'Mines, Incorporated, title to the above mortgage, provided the mortgagee at that time is not in default of any of the provisions by it to be performed. * * *" (R. 110-11).

"6. Anything in this agreement to the contrary notwithstanding, the $2,000,000.00 mortgage to be executed, above referred to, shall be for $1,500,000.00 until there can be included in said mortgage, first by bill of sale from Sheriff or assignment thereof, and subsequently by deed or otherwise, good title to the property sold by Sheriff's sale, in accordance with the judgment of the California Hidden Treasures Mines Company, which sale took place between the dates of June 1st and June 15th, 1934, formerly the property of Chain O'Mines, Incorporated.

7. The tax delinquency clause in said mortgage shall provide that the mortgagor may be delinquent in any and all taxes to a date not later than ninety (90) days prior to the date of the last rights of redemption. * * * (R. 113).

9. L. M. Seeley, for himself and assigns, agrees that from time to time he or they will cause funds to be made available so that any interest other than the Public Service Corporation of Colorado or Edward H. Lewison may have in said Sheriff's Deed will be acquired and merged. * * * (R. 114).

13. L. M. Seeley and/or his assigns, and Chain O'Mines, Incorporated, agree that the escrow heretofore referred to shall, at the end of five (5) years, be dissolved, and the securities held by said escrowee shall be turned over to the parties as their interests may appear. * * * (R. 115).

At this point, a word about the agreement of June 19, 1934, from which we have first quoted.

It is to be noted that this instrument is silent in one of its aspects. That is with respect to the time within which, or *when* the mortgage provided for was to be executed and delivered. It should be known that Kremm prepared and presented this agreement. In Paragraph 3 it is provided that for the first two years the interest rate should be 1% per annum and the royalty rate 5¢ per ton, whereas, for the balance of the term of 25 years the interest rate was to be 4% per annum and the royalty or tonnage payments 20¢ per ton. This two year period of a light load—interest and royalty—closely coincides with the time provisions in the contracts made for purchase of the labor and power liens, about 19 months. But in order to clear up this sole equivocal element of the contract, we quote from testimony of Kremm wherein he relates a conversation between himself and his associate, Schwerin, pertaining to this subject:

> * * * "When I first discussed the agreement with him (Schuwerin), I don't think it was quite in its final form. When it was in its final form it was shown to him and I discussed it with him. He read it. * * *
>
> "We propose, as you see by this agreement, to certify the sheriff's purchase certificates, or sheriff's sale certificates', I think I called them 'with the first payment of five thousand dollars.' * * * 'The real important thing and the only thing of value that I see in that property is the right to operate it free of any harassment.' I told him in the preparation of this agreement I tried to eliminate, or effect a plan that might leave the door open for the harassment of the old creditors of the Chain O'Mines. * * * I said, of course, as this agreement sets forth, the Williams one, or Lewison one would cost ultimately $48,500, if we were punctual in our payments, and the Public Service

one I did not yet know, but I was of the belief, from the discussions I had had with them, that when our capital was in shape we would be able to deal with them for somewhere about 60% of the face of their certificate, and the face of their certificate I think was about thirty-two or three thousand dollars. * * * I said, 'Now, we have got about nineteen months in which to acquire these purchase certificates. At the end of that nineteen months we will certainly know by that time whether we have got anything to chew on here.' I said, 'If out of the operation of this property we have been able to pay the sixty-five or seventy thousand dollars involved in these purchase certificates, then it is time enough to begin to think of the plans of that mortgage.' I said, 'I don't care. That mortgage calls for $2,000,000 on that contract,—called for $2,000,000 on the mortgage, and under certain circumstances, for a million and a half dollars. It is due in 25 years. * * *' I told him this, moreover, that 'Of course, you have not a hazard. You got what I consider to be a business man's hazards. The possibilities of profit I think are very large, and I think that the hazard,—ratio of hazard to the possibilities of profit is small' '' * * * (R. 959-60).

We respectfully beg the court's pardon for burdening it with this lengthy quotation from the record, but it should be remembered that this testimony was given by Kremm at the hearing of this case as to vital events concerning the lawsuit which had happened about four years previously. Naturally, the gist of the action was: *The agreement of June 19, 1934 and the Mortgage provided therein.* And Kremm is here presumably giving testimony in support of *some defense theory.* In any event, it would appear from this testimony, that except for a small cash

capital investment, Kremm had planned, from proceeds of operation of the mining properties, within a period of less than two years to pay and liquidate the labor and power lien to Edward H. Lewison and Public Service Company, and, moreover, to provide for interest, taxes and all other charges on the properties, and, royalty reserves to retire, within the 25 year period, the entire $1,500,000 mortgage indebtedness. Hence it would appear the plan originally in Kremm's mind contemplated awaiting until liquidation of labor and power lien—less than two years—and acquiring full legal title, before executing the mortgage provided for in the contract.

Just when the idea first entered Kremm's mind, assented to and joined in by his co-conspirators, to defraud Chain O'Mines of its properties, without paying any compensation therefor, of course, no outsider knows; nor does it make any difference in this lawsuit. But it was effectuated. And the contract was so skillfully and equivocally drawn on the point of the time within which mortgage was to be given, that there would be ample time for the conspirators to decide what form their dishonest manipulations with respect to Chain O'Mines properties should take.

But to further analyze the opinion of the Circuit Court of Appeals with respect to the facts discussed. The learned judge who wrote the opinion, on page 623, says:

> "Defendants found the operation of the mines, loaded with a heavy past due mortgage and large labor and power liens, which were not only pressing but insistent, quite like plaintiff's experiences—sad and disappointing. The deeper they got in, the worse off they became. Yet the sum total of these operations resulted in the postponement of the liens and mortgage execution which meant a longer time for plain-

tiff and its stockholders to raise the money with which they might reclaim the property. The latter seemed, however, not disposed to venture more but to 'stand by' and participate in the profits if success crowned the defendants' efforts."

There is no foundation in the record for any of these statements.

The mines were not loaded with a past due mortgage. That mortgage had been eliminated by the decree in the foreclosure of the labor and power liens (R. 893).

The labor and power liens were pressing only in accordance with the contract in which defendants had agreed to acquire them (R. 110).

The mining operations were profitable. In Registration Statement filed with Securities and Exchange Commission on behalf of United Gilpin Corporation, by Messrs. Kremm, Schwerin and Seeley, as directors and officers, the following facts appear: From July 25, 1934 to December 31, 1934, the profits were $1,512.22 (R. 824); from February 1, 1935 to April 30, 1935, $22,178.48 (R. 825); from May 1, 1935 to April 30, 1936 $36,781.00 (R. 815); from May 1, 1936 to April 30, 1937, $28,834.90 (R. 815). The last two years' net profit were carried to Earned Surplus (R. 815).

The operations did not postpone any mortgage execution.

The liens had been foreclosed and defendants had agreed to acquire title through the foreclosure, without any agreement by which Chain O'Mines could reclaim the property.

The stockholders could not "stand by" or under any circumstances participate in profits. They had parted with

their equity. Their only possibility of remuneration lay in the payment of the mortgage agreed to be given their corporation.

It will thus be observed that this second corporation organized by Messrs. Schwerin, Kremm and Seeley to take over these properties did not fare so badly as the opinion of the Circuit Court of Appeals indicated, for, as we have seen, the net earned surplus for the period from May 1, 1935 to April 30, 1937 was $65,615.90.

In the succeeding paragraph, the opinion continues:

> "It is true there is some testimony that Kremm agreed to *float* a two million dollar mortgage and failed to do so. Moreover, he failed to sell the property to 'an English syndicate' and he utilized moving pictures and incurred expenses in endeavoring so to do. Such efforts, though futile, do not evidence fraud as much as they do good faith. Endeavoring, and even agreeing to raise two million dollars on a gold mine property is one thing. Actually raising the money, especially in the thirties, was a vastly different matter." (Italics ours.)

We are mystified. There is nowhere in the record in this case the slightest testimony or evidence that Kremm or anyone else agreed to "**float**" a two million dollar mortgage; the contract of June 19, 1934, did not so provide. Nor is there anywhere any mention that he "failed to sell the property to 'an English syndicate' and he utilized moving pictures and incurred expenses in endeavoring to do so." Perhaps the court was confused by the fact that Kremm served upon the board of directors of Chain O'Mines on two distinct occasions and for two separate periods. Kremm, in his testimony fixed February, 1933 as the month when he was elected the first time

and then served less than three months or until about the middle of May, 1933 when he resigned and had no further connection with Chain O'Mines for many months (R. 937). Prior to this first period, as shown by his testimony, in the latter part of the year 1932, he was told by the then president, Dr. Muchow, that if he would arrange for the sale of the property for one and a half millions dollars he would pay Kremm a 10% commission, and gave him a letter to that effect. Also that he was told where the property was and that it consisted of about 1100 claims and a 2,000 ton mill; that he was shown a number of still pictures, and at or about that time was shown a moving picture of the operation by someone from Burton Holmes office. That was either in the latter part of November or the early part of December, 1932 (R. 933). The attempted sale by Kremm to an English syndicate, or others, occurred, according to his testimony, in the latter part of the year 1932 under the 10% commission arrangement. But nothing happened (R. 934). There thus is evidence in the record that Kremm was shown moving pictures of Chain O'Mines operations, but none whatever, as assumed by the court's opinion, that Kremm "utilized moving pictures and incurred expenses in endeavoring so to do."

Misconstruction of Law.

This court's attention is now directed to that part of the opinion which seeks to state the law applicable to fraud, actual, willful and malicious, or, passive, implied, or purely legal and constructive.

In this connection, after summarizing the conclusions of law of the District Court, the opinion states:

> "We direct our attention first to that provision of the decree ordering a conveyance of the property in-

volved to the plaintiff, 'without indemnity, reimbursement or credit * * * for loans, contributions, advances, and for debts and liabilities incurred by said defendants.' Is this conclusion justifiable?"

And thereupon the opinion proceeds in (1, 2) to state the law applicable to a trust *ex maleficio,* concluding:

* * * "A trustee *ex maleficio* may not profit from his wrongdoing, but equity will not penalize him for contributions which are really for the benefit of the *cestui.*" * * *

To sustain this interpretation of the law, the opinion quotes from Vol. 1, Section 158, of the Restatement of the Law of Restitution, together with the comment thereon, and as well from Section 177. This, of course, is good law when applied to the ordinary constructive trust based upon the ordinary legal fraud. But it will be observed that in comment referred to, this qualification appears:

* * * "*Thus, in the absence of extraordinary circumstances, requiring the imposition of a penalty,* if a person by fraud obtains title to land subject to a mortgage and pays the mortgage, he is entitled to compensation for such payment upon being required to surrender the land."

Here we have the distinction between the ordinary, perhaps more or less innocent constructive fraud imposed by law for various reasons, and the *extraordinary,* actual, deliberate, willful, malicious fraud—fraud *ex maleficio.* (Italics ours.)

We supplement comment on Section 177 quoted in opinion:

"Where the property was transferred to him by mistake he cannot be compelled to surrender the prop-

erty unless he is reimbursed for the amount of his expenditure. On the other hand, *where he obtained the property by fraud, he is ordinarily not entitled to any reimbursement for improvements made by him.*" (Italics ours.)

The opinion thereupon goes on to state:

"The decisions of the Supreme Court of the State of Illinois, the forum of this cause of action, are in entire accord with the rule of law contained in the above announcement. In the case of *Feeney* v. *Runyan*, 316 Ill. 246, 147 N. E. 114, it was held:

> Where deeds are set aside because of fraud arising out of a fiduciary relation which the grantee sustained to the grantor, the decree should credit the grantee with any cash payment made at the time of the transaction and with principal and interest subsequently paid on notes given for the deeds and the notes should be directed to be returned to him, but he is not entitled to recover interest paid on the sums paid in cash.

"See also, *Lawson* v. *Hunt*, 153 Ill. 232, 38 N. E. 629, and *Pope* v. *Dapray*, 176 Ill. 478, 52 N. E. 58."

This quotation is taken from the syllabus, a composition of the official reporter and is not the decision of the court. In that case the court held, that the trust involved was that of a trustee *in invitum*, and has reference to constructive fraud only.

The two Illinois authorities cited in the opinion immediately following the above are likewise of the same character of constructive fraud indicated in the decision which the opinion sought to quote.

And thereupon the Appeals Court goes on to say:

> "Passing the ruling of the trial court directing reconveyance of the properties without reimbursement, we are earnestly urged to review the evidence upon which the finding of fraud is based.
>
> "Defendants argue that the evidence fails to disclose fraud, or, stated in another way, all the transactions disclosed by the evidence are equally explainable on the hypothesis of legitimate and innocent motives as on the theory of fraudulent motives.
>
> "(3) The rule of the Illinois Supreme Court stated in *Rubin* v. *Midlinsky,* 321 Ill. 436, 152 N. E. 217, 219, is that a constructive trust will not be imposed except where the proof of fraud is 'clear and convincing and so strong, unequivocal, and unmistakable as to lead but to one conclusion. * * * If the explanation of the evidence may be made upon theories other than the existence of a constructive trust, such evidence is not sufficient to support a decree declaring and enforcing such trust.' "

The foregoing quotation of the Illinois rule as stated in the decision cited, is an emasculation. This is what the Court said:

> "While counsel do not clearly state the character of trust which they contend exists here, we gather that it is sought to establish a constructive trust. While such trust may be established by *parol* testimony, the proof must be clear and convincing," etc. * * * (Italics ours.)

It will thus be seen that the Appeals Court in its opinion *deleted* the essential word *"parol"* and applied the decision generally without the qualification.

In a well considered case in bankruptcy, by Judge Lindley, construing local Illinois law, with respect to the different kinds of fraud, (25 F. (2nd) 211), the Court said:

> [2, 3] * * * "Gross disparity between the consideration paid and the actual value of the property has long been considered a badge of fraud, and, if it is so gross as to justify the inference of actual fraud, a chancellor may refuse to reimburse the grantee. If the grantee participates in the fraud perpetrated upon creditors, has guilty knowledge thereof, or intends to make possible such a fraud, then the transfer becomes void without any reimbursement. See *Biggins* v. *Lambert,* 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238. If, however, the transfer is set aside solely upon the ground that it is, so far as the grantee is concerned, one constructively fraudulent as to creditors, it will be upheld to the extent of the actual consideration, and vacated only as to the inadequacy. See *Beidler* v. *Crane,* 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349. * * *
>
> "What inadequacy of consideration will amount to constructive fraud is a question to be answered from a consideration of all of the circumstances of the particular case (citing Illinois authorities). (See also, *Whitney* v. *Roberts,* 22 Ill. 381.)
>
> "The ground of each of the decisions is well stated by the Supreme Court in the last-mentioned case, (*Nelson & Co.* v. *Leiter,* 190 Ill. 414, 60 N. E. 851, 83 Am. Rep. 142) as follows: 'A conveyance of property may be deemed fraudulent as against creditors upon two distinct grounds: First, where the conveyance is entered into with the fraudulent intent to hinder and delay creditors; second, where, from the terms of the agreement for the conveyance or the nature of the

transaction, the conveyance is declared fraudulent as a conclusive presumption of law, without regard to the real motives or purposes of the debtor. In the first class of cases the fraudulent intent is always a question of fact to be established by extrinsic proof. In the latter the conveyance is denounced as fraudulent as a legal inference, though the parties may not have been moved by any real design to hinder, delay, or defraud the creditor. * * *' "

In the case now before this court, under the agreement of June 19, 1934, the value of the properties was fixed by all concerned at $1,500,000 over and above the liens, admittedly less than $100,000, and whether the fraud which resulted in Chain O' Mines losing its corporate assets was actual, willful and malicious, as found by the Chancellor, or merely the ordinary constructive or legal fraud, the beneficiaries of the transaction, under Illinois law, were bound to at least account for and pay the difference of the consideration over and above the liens discharged, or reconvey the properties.

The Appeals Court, in reversing the District Court, approved the confiscation of Chain O' Mines' properties by respondents, wholly without consideration.

The Circuit Court of Appeals has thus decided a question of local law in a way conflicting with applicable local decisions.

Conflict With Another Decision of Circuit Court of Appeals.

The opinion herein is in conflict with another decision by the same court on the same question. *In re Country Club Building Corporation* (C. C. A., 7th), 91 Fed. (2d) 713.

The Fraud.

Now, with respect to the conspiracy charged and found to exist by the District Court, we direct the court's attention to the case of *The People* v. *Small*, 319 Ill. 437, wherein Len Small, late Governor of Illinois, with certain associates, was charged, while State Treasurer of Illinois, with having entered into and consummated a conspiracy to defraud the State out of public moneys in his charge. In an exhaustive opinion, the court on page 448, said:

> "The bill alleges and the decree finds that Small and the Curtises entered into an unlawful confederacy to use the public moneys for their private gain. In order to support this allegation and finding it is essential that the conspiracy be established by the evidence, but it is not necessary to prove that the co-conspirators came together and actually agreed, in terms, to pursue their common design by common means. If it is proven that the co-conspirators pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it with a view of attainment of the same object, the natural deduction from this proof is that they were engaged in a conspiracy to effect that object. (Citing authorities) "*A conspiracy may generally be inferred from circumstances.* It is seldom that any one act, taken by itself, will establish a conspiracy, but when taken in connection with other acts, it may appear clearly that the series of wrongful acts result from concerted and associated action. Considered separately the acts of a conspiracy are rarely of an unequivocally guilty character, and they can be properly estimated only when connected with all the surrounding circumstances.

Where a conspiracy is once established, every act and declaration of each member in furtherance of the common design is in contemplation of law the act and declaration of all the members and is therefore original evidence against each of them. (Authorities)'' (Italics ours.)

A detailed succinct chronological story of the several steps by which this fraud was accomplished, is found in Insert No. 3 of respondents' registration statement filed with Securities and Exchange Commission (Plffs'. Ex. 74, R. 638) to which we invite particular attention.

Review of Evidence.

We respectfully submit that the Court of Appeals has departed from the accepted, usual and familiar rule of judicial proceeding by reversing the findings of fact of the District Court made upon substantial evidence.

We also submit that the series of steps detailed in respondents' registration statement (Ex. 74, *supra*) coupled with 148 pages of oral testimony, (R. 80-81, 84, 106-108, 130-133, 142-143, 195-198, 200-209, 212-215, 260-262, 269-272, 289-292, 369-376, 899-903, 906-907, 99-970, 972-974, 976-1009, 1020-1042) much of it conflicting, amply suffice to support the findings of the Chancellor. By the simple process of wrecking the first corporation, Central City Gold Mines Co., respondent, which held the contracts for the labor and power liens and the formation of a new corporation, United Gilpin Corporation, respondent, and through its medium procuring the same title, Schwerin, Kremm and Seeley acquired the whole equity in the properties, for which Chain O' Mines received no consideration whatever.

The words of Mr. Justice Holmes in *Adamson* v. *Gilliand*, 242 U. S. 350; 61 L. Ed. 356, an injunction case, are applicable here:

> "* * * The case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable'."
>
> *Davis* v. *Schwartz*, 155 U. S. 631; 39 L. Ed. 289-291.

CONCLUSION.

We respectfully submit that under any aspect of the case the pleadings and the evidence state a cause of action, and had the Court of Appeals decided that the fraud found by the Chancellor did not warrant a decree ordering conveyance to Chain O'Mines "without indemnity, reimbursement or credit * * * for loans, contributions, advances, and for debts and liabilities incurred by said defendants," that Court should have made its own equitable judgment, or directed the District Court to modify its decree instead of closing the door of Chain O'Mines and its stockholders against any further relief.

It is urged that the petition be granted.

Respectfully submitted,

FELIX J. STREYCKMANS,
Counsel for Petitioners.

JOHAN WAAGE,
LOUIS COHEN,
Of Counsel.